

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Case No. 2002-1451-FC

Case No. 2002-1454-FC

vs.

WILLIAM J. CUSTER,

Defendant-Appellant.

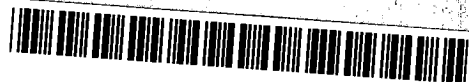
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OPINION AND ORDER

Defendant, in pro per, moves for relief from judgment under MCR 6.502(G)(2), which permits a subsequent motion for relief in the event new evidence was not discovered before the first such motion.

The Court incorporates by reference the factual and procedural statements as set forth in previous decisions issued by this Court. As a preliminary matter, although defendant is correct in his assertion that he is entitled to legal counsel at all stages of the trial phase and requests same, the Court points out that upon conviction, any motions thereafter are considered post-judgment and defendant is entitled to counsel under limited circumstances; the instance situation not being one in which counsel must be provided.

Defendant requests relief from judgment on the grounds that from the new record produced, it is clear that his guilty plea was involuntarily made. His sole basis for this conclusion is premised on a statement this Court made in an Opinion and Order issued March 30, 2006. Defendant asserts that the statement made conclusively demonstrates that the Court was



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actually of the opinion that the guilty plea was coerced. The statement to which defendant refers is as follows: "However, due to concern for his wife's safety, defendant took the plea offer that he had rejected in July, 2002," which is a paraphrase of defendant's affidavit filed September 16, 2003. This statement was inserted as a point of background information, not as a dispositive conclusion, as it had nothing to do with the issue the Court was addressing, i.e., corrections to defendant's Presentence Investigation Report.

Applicable Law

MCR 6.502(G)(2) provides that a defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. Here, defendant asserts a claim of new evidence in the form of a contrary statement made by the Court against defendant's earlier claim that his plea was involuntary.

From what the Court can discern, the new evidence presented is a copy of the transcript of defendant's *Ginther* motion hearing to withdraw his guilty plea because it was coerced<sup>1</sup>. The salient points of the transcript that defeat defendant's position are as follows:

"The – there was no incentive for me to take that plea [June 17, 2003]. When I took that plea I was told that I was better off taking that plea than going to trial because if I went to trial I'd get slammed and that Mr. Sheikh had said he had a good reputation with the trial Judge and the prosecutor and he thought he could get me some kind of leniency if I took this plea. With that in mind, I took the plea under the advisement so that if it wasn't to my satisfaction I could withdraw it."

Transcript, 12-19-2003, p 18.

Regarding defendant's withdrawal of the June 17th plea, he stated he withdrew it because,

"I believe they were trying to sentence me to nine to twenty-five years and I didn't think there was any kind of leniency taken in there. I was under the impression from [counsel] that I would be looking at half that time versus, you know, that much time."

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<sup>1</sup> As well as based on ineffective assistance of counsel, which has already been addressed and decided in a previous Opinion and Order and will not be again addressed.

He further stated:

"... he didn't say that he had any specifics worked out, but he said he would do what he could and he had a good relationship and he thought he might be able to get me somewhere in the range of three to five years as my minimum, which at that point to protect my wife from, you know, further, you know, come in to testify and further proceedings, I was willing to accept that."

Transcript, 12-19-03 pp 18-19.

Regarding conversations on the scheduled day of trial, October 8, 2003, with his counsel:

"Yes. He said we had an offer from the prosecutor and they were going to drop my probation violation, which was involved with this because of the crime that was committed, and they were going to drop another charge and drop two - they were going to drop about half the charges and give - let me plead guilty just to two, the robberies and use of a gas-ejecting device, and at that point, I said no because I said is there any type of sentence agreement. He said, "No." I said, "Then I won't agree to that." .... I said, is Angela [his wife] there?" He goes, "No, and she probably won't be." He goes, "If she does show up they're probably going to arrest her." .... So at that point, I was told that Angela probably wouldn't be there and it would be to my best interest to take the plea or Angela was going to have to suffer the consequences of being arrest (sic) too. But if I took the plea, they would not pursue that."

Transcript 12-19-03, pp 24-25.

Regarding the review of the presentence report with his counsel, defendant was asked,

Q " ... you didn't like the sentence, did you?

A "No, sir."

Q "And because you didn't like the sentence you withdrew the plea, correct?"

A "That's correct."

Transcript, 12-19-03, pp 30-31.

Regarding any discussion about his wife at the plea taking October 8, 2003:

A I was told by Mr. Sheikh what plea I had entered.

Q You discussed the plea with him, correct?

A Yes.

Q. All right. You never discussed with the Court the promises that you claimed were made regarding Angela Cona [defendant's wife] when the plea was taken in open court, did you?

A No.

Q You never discussed it with me [prosecutor], did you?

A Nope.

Transcript 12-19-2003, p 35.

Regarding the day scheduled for trial, testimony from defendant's counsel:

"First of all, I don't recall if she [Angela, defendant's wife] showed up or not. We had no discussions about her. The only discussions we had were at that point he was naturally down because the suppression hearing had not gone in our favor and that was extremely difficult in us being able to present at trial, so he knew with all the charges stacked, with him having admitted it, the evidence having been there and it being corroborated, it was a very, very upheld (sic) battle to proceed with a jury trial and he went ahead and took the plea."

Transcript 12-19-03, pp 58-59.

#### Applicable Law and Discussion

Defendant maintains that if he pleaded his guilt, his wife Angela would not be arrested for certain alleged offenses (obstructing justice) she had committed. Because of this, he contends he was coerced into pleading instead of going to trial. There is no *per se* rule against encouraging guilty pleas. *Corbitt v New Jersey*, 439 US 212, 218-219; 99 S Ct 492 (1978).

The majority of jurisdictions which have passed on the question of promise of leniency have held that a promise of leniency for a relative is not, of itself, coercive enough to vitiate a guilty plea as a matter of law. *People v James*, 52 Mich App 422, 424-425; 217 NW2d 408 (1974). Instead, the question in each case is whether the inducement for the guilty plea was one which necessarily overcame the defendant's ability to make a voluntary decision. *Id.* When *People v James* was reviewed at the Supreme Court level, the Supreme Court stated, "While a promise of leniency for a relative does not in itself amount to coercion so as to make a guilty plea involuntary as a matter of law, we recognize that it may render a plea involuntary as a matter of fact." *People v James*, 393 Mich 807, 808; 225 NW2d 520 (1975). The Court then mandated that the trial judge shall determine after an evidentiary hearing whether the promise of leniency to defendant's [relative] rendered the defendant's plea involuntary in fact. *Id.*

Clearly, from the record produced, during both pleas, defendant unequivocally stated at the time of his plea that there had been no threats, promises or inducements, that his plea was voluntary, that he understood the terms of the plea. Defendant admitted that he had a gas-ejecting device that he used as a weapon, and he denied that any guarantees had been made to him regarding leniency in taking a plea. On October 8<sup>th</sup>, 2003 defendant stated that he understood that it was his choice to make a plea. Further, although he did not remember specifically, he had no reason not to believe that he had been satisfied with the advice from counsel. He further stated he remember stating, "Yes, sir. I hope you do accept my plea today."

Although the Court has found a sound basis for denying defendant's request for relief, it would be unjust to ignore those portions of the evidentiary hearing of October 8<sup>th</sup>, 2003, that could weigh in defendant's favor.

Regarding defendant's June 17<sup>th</sup> plea when asked why he said in open court before the judge that there were no threats or coercions made to induce him to plead guilty, he responded:

A Because I was told that's what I had to say.

Q And who told you that?

A My attorney, Mr. Sheikh. He also told me at the time when I was taking my plea I did not admit to having a weapon and at that time there was a council, chamber council, my attorney, Mr. Mancini, and the Judge and they came back out and talked to me. Mr. Sheikh talked to me over again and told me that I had to admit that I had a gun if I was to – they were going to accept this plea.

Q But at no point in time during the plea did you admit you had a gun. You admitted you had a gas-ejecting device that you used as a weapon; isn't that correct?

A That is correct.

Transcript 12-19-2003 pp 26-27.

Regarding the plea taken on October 8, 2003, the prosecutor asked:

Q Now, isn't it true that the only reason that you're contesting the situation at hand is because, again, you don't like the sentence that you received?

A No. I didn't get effective assistance of counsel and they ended up going after my wife.

Transcript 12-19-2003 pp 35-36.

Regarding giving up his rights in taking a plea on October 8, 2003:

Q And you understood that you had all of these rights available to you?

A Yes. I was told I had those available to me.

Q Okay. But you did enter a plea on that day, did you not, sir?

A Yes, against my will.

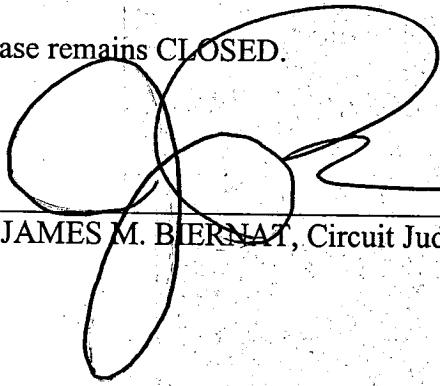
Transcript 12-19-2003 p 38.

Nonetheless, defendant admitted he understood all the rights that he had in the matter, the trial by jury, the right to confront witnesses, and so forth, all the rights available to him that he would be giving up if he took a plea. Defendant also was quite clear that he would not accept the plea until he was advised as to the sentencing, and once it was determined, he was not satisfied, and withdrew his plea. In this event, even though he also expressed some concern for his wife's likely arrest, the Court is not convinced that as a matter of law, this expressed concern constituted coercion such as would mandate reversal. In addition, the Court is convinced that defendant fully comprehended what he was doing on both June 17<sup>th</sup> and October 8<sup>th</sup>, and having exhausted all other avenues for relief, now claims he was coerced, and pleaded against his will, as a last-ditch attempt for justification for a reprieve. In summarizing, indeed, the Court is compelled to view defendant's dissatisfaction with the sentencing scheme far outweighed any concern he had for his wife's likely arrest for obstruction of justice.

Furthermore, contrary to defendant's assertion that because the Court paraphrased a statement in defendant's affidavit that his plea was involuntary due to his concern for his wife's safety, the Court is not convinced this constitutes new evidence such that defendant's request for relief under MCR 6.502(G)(2) should be granted. As previously stated, that was not a matter at issue, and was mentioned merely as background information.

For the above-stated reasons, defendant's subsequent motion for relief from judgment under MCR 6.502(G)(2) is DENIED. This case remains CLOSED.

IT IS SO ORDERED.



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JAMES M. BIERNAT, Circuit Judge

JMB/kmv

DATED: August 10, 2006

cc: Denise Hart, Asst. Prosecuting Attorney

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